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Letter Ruling 21-04 (Public Officer's Acceptance of Private Security Detail)

Summary: It would be a violation of Article XXIX for Requestor to pay for private security arrangements for a public officer under the facts and circumstances of this request.

I. Background

A section 527 tax-exempt political organization (“Requestor”) requests a letter ruling from the Independent Ethics Commission asking whether Requestor, other tax exempt organizations, and/or other individuals may pay for a public officer’s “...security protection at public appearances [in the public officer’s] nonpersonal capacity in the wake of an increasing volume of threats... in order to safeguard [the public officer’s] physical wellbeing[.]” Requestor specifically requests approval to provide security to the public officer at all “public, nonpersonal events and as needed based on threat level.” Requestor does not seek to provide 24/7 security detail to the public official, but does leave open the possibility of providing security outside of public events.

Requestor provided multiple examples of the ongoing threats received by the public officer, which included serious threats of physical violence and death. Some of those threats have risen to the level that Colorado State Patrol (“CSP”) has provided security in discrete instances, but Requestor has indicated that security is not provided on an on-going basis.

The cost to provide private security for the public officer would be approximately \$65/hour, capped at \$1,000 per week.

II. Jurisdiction

The Commission has jurisdiction over public officers pursuant to § 2(6) of Colo. Const. art. XXIX. Any person who is not a public officer, member of the general assembly, local government official, or government employee may submit a request to the commission for a letter ruling concerning whether potential conduct of the person making the request satisfies the requirements of article XXIX. § 24-18.5-101(4)(b)(III), C.R.S.

III. Applicable Law

Section 3(2) of Article XXIX of the Colorado Constitution provides:

No public officer...either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) [currently adjusted to \$65] in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer...who solicited, accepted or received the gift or other thing of value.

Section 24-18-104(1), C.R.S., provides in pertinent part:

...A public officer... shall not:

(b) Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

(I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

(II) Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

IV. Discussion

The purpose of Article XXIX of the Colorado Constitution, with some exceptions, is to restrict gifts to covered individuals, including public officers. Section 24-18-104(1), C.R.S., also restricts gifts to covered individuals. However, the two gift bans do not prohibit gifts to a governmental entity, department, agency, or institution.

The Commission employs a five-factor test in determining whether a gift is to a public officer in their individual capacity or to the government. *See* Position Statement 12-01. The Commission considers: (1) whether the offer is to a specific individual or to a designee of the state or local agency; (2) whether the offer is *ex officio*; (3) whether the gift is related to the official duties of the covered individual; (4) whether there is an existing or potential conflict of interest or appearance of impropriety; and (5) whether the primary purpose of the gift is educational or business-related. *See* Position Statement 12-01. Although the five-factor test is typically used in the context of travel, it has also been used in analyzing the acceptance of other gifts. *See, e.g.*, Letter Ruling 16-02 (analyzing waived conference registration fees); Advisory Opinion 20-03 (analyzing a gift of protective gear for emergency medical services).

Under the first factor, the Commission finds the offer of security here is to a specific, named public officer. Under the second and third factors, both the threats and the offer are being made by virtue of the recipient's public office and in connection with the official duties of the public officer.

However, the specific language of the request indicates that the offer is being made in the public officer’s “nonpersonal capacity”. “Nonpersonal capacity” is broader than *ex officio* capacity. For example, the public officer currently serves in her *ex officio* capacity in government, but also in her “nonpersonal” but political capacity as Requester’s chair. Additional discussion of the phrase “nonpersonal capacity” appears below, after consideration of the remaining factors.

Under the fourth factor, the Commission finds that there is the potential for a conflict of interest or the appearance of impropriety. Subsection 1(1) of Article XXIX states, in pertinent part:

(1) The people of the state of Colorado hereby find and declare that:

* * *

(c) [Public officers] shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated...

The request indicates that Requestor has no plans to support the public officer’s re-election campaign and that Requestor does not have, or anticipate having, any business before the public officer’s department. This does not end the inquiry, however. The Requestor is an organization of partisan public officials from numerous jurisdictions. The public officer currently serves as Requestor’s chair, and is involved with Requestor’s administration, strategy, fundraising, conference planning, selection of policy discussions, and related matters. The public officer also meets with Requestor’s potential supporters in connection with Requestor’s fundraising events. In the public officer’s role as Requestor’s chair, the public officer is in a position to influence the Requestor and its membership. The public officer is also in a position to be influenced by Requestor and other unnamed donors. The appearance of impropriety in a political organization providing a security detail to its chair, a high-ranking public official, is significant. This appearance of impropriety is heightened because the sources of money for private security other than Requestor—the other individuals or nonprofit organizations—are not named in the request and can therefore not be adequately analyzed for conflicts.

Under the fifth factor, the gift is related to the business activities of the public officer, at least to the extent the gift is connected to the public officer’s official duties. However, it is also related to other activities outside of the public officer’s official role—*i.e.*, her political activities. The Commission has previously determined—and the Colorado Supreme Court has agreed—that political activities are for one’s personal benefit. Complaint 12-07; *Gessler v. Smith*, 419 P.3d 964, 967 (Colo. 2018).

Under the second, third, and fifth factors, above, the Commission considers whether there is a distinction between gifts to support the public officer’s activities in her official capacity and activities in her “nonpersonal capacity,” including political activities. The Commission finds that there is a distinction. The term “nonpersonal capacity”, as used by Requestor, is broad, undefined, and can be interpreted to include the public officer’s official state government capacity, the public officer’s capacity as Requestor’s chair, and other possible “nonpersonal” roles. However, gifts *to the State* must, if anything, be given in connection with the public

officer's official state government role. The Commission notes that a gift to CSP, the state entity responsible for providing security to the public officer, would not necessarily present the same concerns. *See* Advisory Opinion 20-03. If Requestor seeks to supplement or augment insufficient funding for security for public officers, Requestor could do so in that manner.

Subsection 1(2) of Article XXIX states:

The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that *to ensure the integrity of the office, such costs of a reasonable and necessary nature should be born [sic] by the state or local government.*

(emphasis added). This is one of those costs. Unquestionably, the government should pay for protection for its public officials. Balancing the factors discussed above, the Commission finds that the provision of private security by Requestor or others to the public officer would, because no constitutional exceptions apply, be a prohibited gift to the public officer in violation of § 3(2) of Colo. Const. art. XXIX.¹ Because the Commission finds that the provision of private security would be a prohibited gift under § 3(2) of Colo. Const. art. XXIX, the Commission does not address the possibility that it would also be a prohibited gift under § 24-18-104(1), C.R.S.

V. Conclusion

It would be a violation of Article XXIX for Requestor, or the other individuals and organizations referenced in the request, to provide private security to a public officer, as described above.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

The Independent Ethics Commission

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Dated: September 23, 2021

¹ Nothing in this opinion should be construed to limit the Requestor's ability to provide security for its own events, operations, officers, employees, or volunteers, including for the public officer when acting in the public officer's capacity as Requestor's chair.